(1)

91-1264

No._____

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

Richard C. Soehngen,

Petitioner

v.

Merit System Protection Board,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

VOLUME I OF V VOLUMES

Richard C. Soehngen
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QUESTION PRESENTED

Did the Department of Justice, as the employing agency, err as a matter of law or abuse its discretion where it terminated an employee in the Presidential Management Intern Program, which PMI employee was a preference eligible, special compensatory combat-disabled veteran, without extending to that PMI employee those due process rights and tenures specifically set for by Congressional legislation and the regulations implementing the PMI program?

RULE 14.1(b) LIST OF PARTIES TO THE PROCEEDING

The following is a list of the parties to the proceeding in the Court whose judgement is sought to be reviewed: The United States Court of Appeals for the Federal Circuit and the United States Department of Justice.

TABLE OF CONTENTS

VOLUME I OF V

QUESTION PRESENTED i
LIST OF PARTIES ii
TABLE OF AUTHORITIES ix
OPINION 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
STATEMENT OF THE FACTS 5
REASONS FOR GRANTING THE WRIT 27
CONCLUSION 29
PRE-DOCKET COURT CORRESPONDENCE .....

INDEX TO THE APPENDICES

VOLUME II OF V

A. OPINION OF U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, SEPTEMBER 26, 1991 1

B. INFORMAL BRIEF OF PETITIONER, (B1) MAY 15, 1991 4

AND

PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, OCTOBER 9, 1991 24

C. DENIAL OF PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, OCTOBER 31, 1991 31

D. OPINION OF THE MERIT SYSTEMS PROTECTION BOARD, FEBRUARY 28, 1991 33

E. PETITIONER'S REQUEST FOR MSPB JURISDICTION, SEPTEMBER 14, 1990 (APPELLANT'S SUBMISSION ON THE ISSUE OF JURISDICTION) 40

VOLUME III OF V

F. PETITIONER'S OCTOBER 16, 1990 REQUEST FOR THE MSPB ADMINISTRATIVE LAW JUDGE TO CONSIDER ATTACHED AGENCY FACT-FINDER'S REPORT AND RECOMMENDATIONS (APPELLANT'S SUPPLEMENTAL SUBMISSION TO THE RECORD) 1

G. AGENCY FACT-FINDER'S REPORT AND RECOMMENDATIONS OCTOBER 2, 1990 BY MR. ROGER KAPLAN, ESQUIRE, DOJ APPOINTED FACT-FINDER (BASED ON A VERBATIM RECORD OF PROCEEDINGS TAKEN BY A CERTIFIED COURT REPORTER DURING EVIDENTIARY HEARING CONDUCTED ON MAY 30, MAY 31, AND JUNE 16, 1990, ATTENDED BY THE HONORABLE CHIEF IMMIGRATION JUDGE WILLIAM R. ROBIE, THE HONORABLE ASSISTANT CHIEF IMMIGRATION JUDGE MARY ANN MOHAN, PETITIONER, AND OTHER WITNESSES.) 4

H. MSPB ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION, OCTOBER 16, 1990 (WHICH "CROSSED-IN-THE-MAIL" WITH PETITIONER'S REQUEST FOR ALJ TO CONSIDER AGENCY FACT-FINDER'S REPORT.) ... 27

I. DOJ ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION RECOMMENDATION TO DEPUTY AG TO OVER-TURN AGENCY'S OWN FACT- FINDER'S REPORT JANUARY 23, 1991 AND DEPUTY AG TRANSMITTAL FOR CONCURRENCE TO AG FEBRUARY 2, 1991 (WITHOUT PETITIONER'S DUE PROCESS RIGHT TO REBUT DOJ ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION'S RECOMMENDATIONS IN AN OPEN AND IMPARTIAL HEARING.) 33

VOLUME IV OF V

J. 5 U.S.C. § 7511 (a)(1)(B) 1

K. 5 U.S.C. § 4303(e);
5 U.S.C. § 7513 (a), (b), II A. 10. 2

L. 38 U.S.C.S. § 2011 (1), (3), (4), (5);
38 U.S.C.S. § 2014 (a), (b)(1), (c)(d)(e)(f) 3

M. CHAPTER 362, PARAGRAPH 2-8, FPM AND FEDERAL PERSONNEL MANUAL LETTER 362-3 ENTITLED "SIGNIFICANT CHANGES IN THE PRESIDENTIAL MANAGEMENT INTERN PROGRAM AS THE RESULT OF EXECUTIVE ORDER 12364", paragraphs 8 and 10 6

N. 5 U.S.C.S. § 4302 7

O. UNDISPUTED NON-EXISTENT PERFORMANCE WORK PLAN APRIL 1, 1989 TO MARCH 31, 1990 (FIRST POSSIBLE PWP AFTER INCIDENTS OCCURRED.) 8

P. UNDISPUTED NON-EXISTENT PERFORMANCE WORK PLAN DECEMBER 1989 TO MARCH 31, 1990 (SECOND POSSIBLE PWP AFTER INCIDENTS OCCURRED.) 9

Q. THE HONORABLE CHIEF IMMIGRATION JUDGE WILLIAM R. ROBIE'S FEBRUARY 9, 1990 APPROVAL OF NINE (9) TRAINING COURSES FOR PETITIONER TO ATTEND BEFORE INCONSISTENT AUGUST 24, 1990 TERMINATION AS A "TEMPORARY EMPLOYEE"/"EXPIRATION OF PMI APPOINTMENT".. 10

R. SUBSEQUENT UNDISPUTED NON-EXISTENT FINALIZED INDIVIDUAL DEVELOPMENT PLAN (IDP) INCORPORATING REQUIRED TRAINING COURSES ALSO NECESSARY FOR OBJECTIVE EVALUATION OF A THIRD YEAR EXTENSION OF A PRESIDENTIAL MANAGEMENT INTERNSHIP THAT WAS REQUIRED BY OPM APPROVAL OF EXTENSION REQUEST. 12

S. UNDISPUTED NON-EXISTENT PERFORMANCE RATING APRIL 1, 1989 TO MARCH 31, 1990 AND UNDISPUTED NON-EXISTENT PERFORMANCE WORK PLAN APRIL 1, 1990 TO MARCH 31, 1991 (THIRD POSSIBLE PWP AFTER INCIDENTS OCCURRED.) 13

T. FINALIZED PERFORMANCE WORK PLAN JUNE 20, 1990 - PAST AUGUST 24, 1990 PMI THIRD YEAR EXTENSION DATE TO MARCH 31, 1991 (OFFERED VERBATIM BY PETITIONER IN DECEMBER 1989 AS A POSSIBLE BASIS BY WHICH SUPERVISOR AND REVIEWER COULD EVALUATE PETITIONER'S FUTURE PERFORMANCE WITH ABSOLUTE MANAGEMENT DISCRETION.) THIS PWP WAS ONLY FINALIZED AFTER PETITIONER WAS FORCED TO FORMALLY GRIEVE FOR A PWP IN MAY 1990 AND THE DIRECTOR OF EOIR HAD DIRECTED IN-WRITING THAT SUPERVISOR (AND BY EXTENSION, REVIEWER) PROVIDE A PWP TO PETITIONER ON JUNE 6, 1990 (TWO MONTHS BEFORE TERMINATION) 14

VOLUME V OF V

U. THE HONORABLE CHIEF IMMIGRATION JUDGE WILLIAM R. ROBIE'S APRIL 25, 1989 LAW SCHOOL RECOMMENDATION FOR PETITIONER 1

V. SUMMATION OF FEDERAL EMPLOYMENT HISTORY/MITIGATING CIRCUMSTANCES 3

W. THE HONORABLE CHIEF IMMIGRATION JUDGE WILLIAM R. ROBIE'S JUNE 16, 1989 NOTIFICATION LETTER, WITH APPENDICES X, Y ATTACHMENTS, TO PETITIONER OF PRESIDENTIAL MANAGEMENT INTERNSHIP EXTENSION FOR THE PRIMARY REASON CITED THAT PETITIONER'S "BACKGROUND INVESTIGATION WAS NOT COMPLETED". 16

X. DOJ DIRECTOR OF PERSONNEL'S MAY 23, 1989 REQUEST TO OPM FOR PMI INTERNSHIP EXTENSION ON BEHALF OF EOIR/OCIJ 18

Y. OPM MAY 26, 1989 APPROVAL OF DOJ REQUEST TO EXTEND PRESIDENTIAL MANAGEMENT INTERNSHIP 20

Z. FEDERAL INVESTIGATIVE REPORT ISSUED BY THE FEDERAL INVESTIGATIONS AND PROCESSING CENTER (FPIC), BOYERS, PA AT PETITIONER'S FOIA REQUEST ON SEPTEMBER 29, 1989. (INDICATES BACKGROUND INVESTIGATION WAS ORDERED DISCONTINUED BY DOJ ON JANUARY 13, 1988 - TWO (2) DAYS AFTER PETITIONER JOINED DEPARTMENT - AND REOPENED ON JUNE 29, 1989 AFTER PETITIONER PROTESTED EXTENSION ON JUNE 21, 1989 - EIGHT (8) DAYS BEFORE. THIS FAX FROM THE FIPC ALSO INDICATED DOJ'S MAY 23, 1989 REQUEST TO OPM WAS MADE AFTER PETITIONER'S PROTECTED GRIEVANCE WAS FILED MAY 12, 1989 - AND AFTER INCIDENTS DESCRIBED IN APPENDIX V OCCURRED IN DECEMBER 1988, JANUARY AND MARCH, 1989.) 21

POSTSCRIPT: UNSIGNED OCTOBER 1991 MEMORANDUM OF UNDERSTANDING REGARDING ATTORNEY NOTIFICATION OF HOMOSEXUAL MISCONDUCT IN SEPTEMBER 1989 AND BY LETTER AND FAX IN NOVEMBER 1990. 35

TABLE OF AUTHORITIES

Federal Constitutional Provisions:

Amendment V, United States Constitution

Federal Statutes:

5 U.S.C. § 4302
5 U.S.C. § 4303(e)
5 U.S.C. § 7511(a)(1)(B)
5 U.S.C. § 7512
5 U.S.C. § 7513(a), (b)(1), II A 10

Federal Personnel Manual Regulations:

Chapter 362, Presidential Management Intern Program
Federal Personnel Manual Letter 362-3 "Significant Changes in the Presidential Management Intern Program as the Result of Executive Order 12364"

Agency Regulations:

DOJ Order 1771.1B, U.S. Department of Justice

Agency's Factfinder's Report and Recommendations:

Agency's Factfinder's Report issued by Mr. Roger Kaplan
Record of Proceedings, May 30, May 31, and June 16, 1990 Hearing (Three Bound Volumes of Sworn Testimony)

Federal Investigative Report:

Issued by the Federal Investigations and Processing Center, Boyers, PA at Petitioner's FOIA Request on September 29, 1989.

CASES:
(Reserved for Brief on the Merits)

Miller v United States (1983. CA3) 717 F2d 109, later proceeding (CA3) 753 F2d 270 (disagreed with Gavette v OPM (CA FC) 785 F2d 1568, transf to (CA FC) 788 F2d 753).

("Employee" for purposes of 5 USCS § 7511(a)(1)(B) includes preference eligible civilian employee of Armed Force who has completed one year of continuous service)

Flanagan v Young (1955) 97 App DC 119, 228 F2d 466.

(Veterans Preference Act (former 5 USCS § 7512) is to be construed, wherever possible, in favor of veterans; especially, this should be done where right to defend oneself from charge of wrongdoing is right involved.)

Ainsworth v United States (1967) 180 Ct CL 166.

(In determining eligibility for provisions of Veterans' Preference Act, determination that individual is in excepted service rather than in competitive service is distinction without significance.)

Miller v United States (1977, ED Pa) 438 F Supp 514.

(Veterans' Preference Act (former 5 USCS § 7512) applies to "preference eligible employees," being class of special employees ... who have completed trial period as executive agency employee (5 USCS §§ 2108(3), 7511), and statute permits removal of government employee only for such cause as will promote efficiency of service.)

Carter v Department of Army (1/23/84, MSPB) Docket No. DE07528210248.

(Employee serving under temporary appointment pending establishment of register, while not having competitive status, is in com-

petitive service; board consequently has jurisdiction over appeal of employee serving under temporary appointment where employee was removed after serving almost 3 years in position.)

Strawbridge v U.S. Postal Service (8/12/86 MSPB) Docket No. CH 07528510579, 31 MSPR 386.

(MSPB has appellate jurisdiction over employee's appeal of his removal where employee had more the "one year of continuous service ...")

Weston v U.S. Dept. of Housing & Urban Dev. (1983, CA FC) 724 F2d 943, 14 Fed Rules Evid Serv 1737.

(Removal is adverse agency personnel action under 5 USCS § 7512 and is accordingly reviewable under of 5 USCS § 7513.)

Sorrels v Veterans Administration (1783, SD Ohio) 576 F Supp 1254, 36 BNA FEP Cas 1323

(Removal is adverse action for which employee against whom such action is taken has right of appeal to the Merit System Protection Board.)

Stringer v United States (1950) 177 Ct CL 30, 90 F. Supp 375

(Veteran did not receive 30 full days of notice, where he was notified with less than 30 days notice.)

Connelly v Nitze (1968) 130 APP DC 351, 401 F2d 416

(Standard by which notice of proposed removal is to be measured requires that such notice adequately apprise employee of what he will be called upon to defend.)

Hayes v Department of Navy (1984, CA FC) 727 F2d 1535.

(5 USCS § 7503 requires that agency state in notice reasons for proposed action, and provide opportunity for oral and written replies as well as representation by counsel.)

Kolstad v Department of Agriculture (2/18/86 MSPB) Docket No. SE 07528510165, 30 MSPR 143

(Agency is required to provide information that is not only correct in nature but adequate in scope to allow employee to make informed decision including obligation to correct any erroneous information that agency has reason to know employee is relying on.)

U.S. v Charleston County School Dist., 738 F. Supp. 1513 USCA Const. Amends. 5, 14. D.S.C. 1990.

(Criteria which courts should review in order to determine whether a discriminatory purpose was a motivating factor in decision- making process are historical background of the decision, specific sequence of events leading up to challenged decision, departures fro normal procedural sequence, and legislative or administrative history.)

Southside Fair Housing Committee v City of New York, 750 F. Supp. 575, affirmed 928 F.2d 1336. E.D.N.Y. 1990

(Plaintiff may establish discriminatory intent behind action through circumstantial evidence, with relevant factors including degree of any discriminatory effect of action ... presence or absence of departures from normal procedures ...)

Gadsden v United States (1948) 111 Ct Cl 487, 78 F. Supp 126.

(If former civil service employee is removed not for cause that promoted efficiency of service, but maliciously, merely because his superior did not like him ... then employees's discharge is wrongful and illegal ...)

NO._____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RICHARD C. SOEHNGEN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard C. Soehngen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit finding that the Merit Systems Protection Board did not err as a matter of law or abuse its discretion where it determined that it did not have jurisdiction to review the termination of a special compensatory (30 percent or more), preference eligible combat-disabled veteran, which employee was in the Presidential Management Intern Program, from his employment in the Federal Government.

OPINION BELOW

The opinion of the Court of Appeals for the Federal Circuit is unreported and appears in Appendix A to this Petition. The unpublished written opinion of the Merit Systems Protection Board appears in Appendix D to this Petition.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on September 26, 1991. A timely petition for rehearing was filed on October 9, 1991, which is set forth at Appendix B. The Court of Appeals denial of the petition for rehearing was issued on October 31, 1991, and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254, and if applicable, Title 28, U.S.C. § 1651(a) at the Court's discretion.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Amendment V to the United States Constitution provides in relevant part: "... nor shall any person ... be deprived of life, liberty, or property without due process of law."

2. The congressionally-mandated provisions defining preference eligible veterans, 5 U.S.C. § 7511(a)(1)(B) is set forth in Appendix J and removal action covered, 5 U.S.C. § 7512 cited in this Petition.

3. The congressionally-mandated provisions providing for the manner in which preference eligible veterans may be removed from employment, 5 U.S.C. § 4303(e) and § 7513(a), (b),II A. 10., are set forth in Appendix K to this Petition.

4. The congressionally-mandated provisions defining "a special disabled veteran" as a veteran with a disability rating of 30 percent or more, and the policy of the United States to provide the maximum job advancement opportunities within the Federal Government for qualified disabled veterans, 38 U.S.C.S. § 2011 and 38 U.S.C.S. § 2014 respectively, are set forth in Appendix L to this Petition.

5. The Office of Personnel Management's regulation giving the basis for termination of PMI employees, which incorporates those statutory provisions extending certain protections to preference eligible combat-disabled veterans, cited above is found at Chapter 362, paragraph 2-8, of the OPM regulations and is set forth in Appendix M to this Petition.

STATEMENT OF THE CASE

Preface

I, Richard C. Soehngen, Petitioner, served honorably in the federal government as a Presidential Management Intern/program analyst with the Department of Army (August 1987 to January 1988) and the U.S. Department of Justice (January 1988 to August 1990) for a period of three (3) years total service. On August 14, 1990 Petitioner received

a ten (10) day termination notice from DOJ for the sole reason cited as "expiration of PMI appointment." This notice did not reflect Petitioner's known status as a special compensatory (30 percent or more), preference eligible combat- disabled veteran (hereafter referred to simply as a preference eligible veteran).

Subsequently, Petitioner appealed his termination, in-part, on his preference eligible veteran's right to MSPB jurisdiction and an evidentiary hearing, to the MSPB and the United States Court of Appeals for the Federal Circuit. Both lower courts have since decided Petitioner is a "temporary employee", who is not entitled to jurisdiction and the right to an evidentiary hearing in this case. Hence, this respectful Petition for Writ of Certiorari now before this Court.

In March 1987, while still in graduate school, Petitioner was notified by OPM that he had been selected as a 1987 Presidential Management Intern Finalist based on his special compensatory (30 percent or more), preference eligible combat-disabled veteran status.

In August 1987 Petitioner accepted an initial PMI/program analyst appointment as a preference eligible veteran, with a Department of Army agency in Falls Church, Virginia, where he served until January 1988. At that point, Petitioner successfully transferred to the United States Department of Justice, where he came to work in the Office of the Chief Immigration Judge.

In May 1989, Petitioner's participation in the PMI Program was extended into a third year. Ordinarily a two year-program, the PMIP allows for such an extension for additional training and development activities. Such extension must be predicated upon the formulation of an Individual Development Plan, and is granted only after the agency states why the employee could not have received this training during the previous two years of employment.

The primary reason given for Petitioner's PMI extension was that his background investigation was not completed. (This reason was later

shown to be without merit, by the Agency's own-appointed Fact-Finder. (Please see Appendix G for a more detailed explanation of the Fact-Finder's analysis following an evidentiary hearing.)

Petitioner was terminated at the end of the third year with only a ten (10) day notice. Approximately five weeks later, the Agency's own appointed Fact-Finder issued his report, based on three full days of sworn testimony in which twenty-five (25) exhibits and over 550 pages of sworn testimony, transcribed by a certified court reporter, comprise the record of proceedings. The Fact-Finder determined (1) that the United States Department of Justice had committed a prohibited personnel practice by violating Chapter 362 when it requested the extension of Petitioner's PMI internship for reasons that were without merit and (2) that Petitioner should have been converted to career status effective August 24, 1989 (the year before his unlawful termination). For a more detailed view of the circumstances governing this case, please refer to Appendix V, Summation of Employment History/Mitigating Sensitive Circumstances.)

During his three years with the agency, Petitioner never received an adverse action or notification either orally or in writing, that his work was deficient. He was not given an opportunity to contest his termination, as required by law and regulation.

The MSPB Administrative Law Judge, the Merit Service Protection Board, and the United States Court of Appeals for the Federal Circuit have each chosen to ignore Petitioner's preference eligible veteran's status and have denied Petitioner's requests for an evidentiary hearing in which Petitioner could establish that his termination was contrary to law and regulation.

STATEMENT OF THE FACTS

Petitioner respectfully requests the Court to take special note of the fact that there are no issues involving poor or unsatisfactory performance, misconduct, inefficiency, or unsuitability of record, (or of which Petitioner was informed), in this case (or in his three years of honorable federal service) which would otherwise warrant Petitioner's termination.

In March 1987 Petitioner received notification from the Director of the Presidential Management Intern Program (PMIP) that he had been selected by OPM as a 1987 Presidential Management Intern (PMI) Finalist. The letter is reprinted on the following pages for the Court's review.

The letter makes three points which the Petitioner respectfully asks the Court to consider:

1. The Director of the PMIP indicates Petitioner was reconsidered for the PMIP based solely on his special compensatory (30 percent or more) veteran's status, coupled directly with the expected completion of his graduate degree requirements.

2. Based on satisfactory performance, Petitioner could reasonably be assured that he would be converted to career status "without further competitive examination." (In contrast, the definition of a temporary employee, requires "further competitive examination" before conversion to career status.)

3. Petitioner could reasonably expect to look forward to a modest, but successful career in the federal government (based on satisfactory performance).

In addition, there is no reference (in this notification letter that Petitioner was a 1987 PMI Finalist) to suggest that Petitioner's anticipated appointment or tenure as a PMI would be as a "temporary employee" under his Schedule A. appointment or Tenure Group 2-designated tenure.

United States Office of Personnel Management
Washington, D.C.

March 30, 1987

Mr. Richard C. Soehngen
1437 Glenview Road
Palm Harbor, FL 33563

Dear Mr. Soehngen:

This is in response to your request for reconsideration of your application for the Presidential Management Intern Program (PMIP). First, let me apologize for the delay in getting back to you.

Upon further review of the PMIP review process, I have determined that you are due additional consideration based on your status as a compensable disabled veteran. Accordingly, I have added your name to the list of 1987 Presidential Management Intern Finalists. I appreciate your continued interest in a career with the Federal Government and believe there is no better way to begin such a career than as a Presidential Management Intern. I look forward to a meeting and working with you in the near future.

Should you for any reason no longer wish to be considered for a Presidential Management Internship, please NOTIFY US IMMEDIATELY so that alternates may be given the opportunity.

Many Federal departments and agencies are expecting to offer Presidential Management Internships to 1987 Finalists. Detailed information on the referral and placement process, participating agencies, and available positions will be sent to you under separate cover. These materials are designed to assist you in securing an internship position. However, it is important for you to understand that selection as a Finalist does not guarantee a PMI job. Most

Federal departments and agencies are having to deal with reduced employment ceilings. While we hope that all Finalists will eventually receive a job offer, over the next few months you may encounter some uncertainty about exact hiring plans.

One of the materials that will be sent to you is the PMI Handbook of Positions, which lists the agencies expected to participate in this year's Program. You will also be sent forms to be completed and returned to the address given on them. These forms are necessary to start your background investigation known as National Agency Check with Inquiries (NACI) and must be returned promptly. Participating Federal departments and agencies are beginning to review biographical profiles and complete application packages of all Finalists.

As a Federally employed Presidential Management Intern, you will be given a two-year appointment in the excepted service at the GS-9, step 1, level. The salary is approximately $22,500. Upon the successful completion of your internship you will be eligible for conversion to the career service without further competition. Before you begin work as an Intern, you will have to provide your hiring agency with an official document from your college or university verifying that you have completed all your graduate degree requirements, even if the actual degree is to be awarded at a later date.

It is very important to let us know of your phone number or address changes. In the coming months you may be receiving information about job updates. Also, a number of training and development activities for Presidential Management Interns will be scheduled. As plans become finalized, Program staff will be in touch with you.

Feel free to call or visit the Presidential Management Intern Program for information and general advice on the Program. The phone number is (202) 632-0496. Our address is: U.S. Office of Personnel Management, Presidential Management Intern Program/CEG, Room 308, 1121 Vermont Avenue, N.W., Washington, D.C. 20044.

I hope that your experience as a Presidential Management Intern will mark the beginning of a long and successful career in the Federal Service.

Sincerely,

Kenneth Bates
Director
Presidential Management Intern Program

With this preliminary notification letter offered as a guide, the Court is now respectfully asked to consider if the United States Court of Appeals to the Federal Circuit errs as a matter of fact, and as a matter of law, when it cites in its opinion the Petitioner was a "temporary employee". The Court should note that nowhere does it specify that the congressional and executive intent of the Presidential Management Intern Program was to create either explicitly or implicitly a class of PMI temporary employees; to the contrary Paragraph 1-1, Purpose, Chapter 362 specifically states that:

"The Presidential Management Intern Program **established by Executive Order 12008 on August 25, 1977 and reconstituted by Executive Order 12364 on May 27, 1982** is designed to attract to federal service outstanding men and women **from a variety of academic disciplines** who have a clear interest, and commitment to, a career in the analyses and management of public policies and programs." ... "The Presidential Management Intern Program provides for application of appropriate veteran's preference criteria and for equal employment opportunity."

In addition, the United States Court of Appeals for the Federal Circuit errs as a matter of fact, and as a matter of law, when it asserts in its opinion that:

"Petitioner (Soehngen) concludes that OPM's failure to continue his employment was an adverse action applicable to the MSPB."

To the contrary, Petitioner has consistently asserted before the MSPB and the United States Court of Appeals to the Federal Circuit that the direct responsibility for his continued employment (and unlawful termination) was his employing agency, the United States Department of Justice.

Section 2-7, paragraph b(2) of Chapter 362 of the FPM governing the Presidential Management Intern Program is quite specific as to which agency is directly responsible:

"The agency (based on unsatisfactory performance) decides whether or not to convert the employee. No recommendation is made to OPM."

Since 1978 when the PMIP was implemented, each PMI in each federal agency (with the exception of only those PMIs directly assigned in OPM's own personnel management system) has looked to his employing agency for "automatic career conversion" as required by the nature of his appointment and tenure group.

Therefore, Petitioner reasonably asserts to this Court that the lower court has committed fundamentally harmful and reversible error when it misleads Petitioner in its Decision and Order to believe his remedies and relief lie with OPM and not his employing agency, the United States Department of Justice.

While Petitioner looked directly to the United States Department of Justice as the agency responsible for his career conversion as a Presidential Management Intern/special disabled veteran, it is undisputed that OPM's function was, and is, to provide guidance to agencies regarding the Presidential Management Intern Program (PMIP).

In this case, OPM fulfilled its responsibilities to the United States Department of Justice and to the Petitioner by providing relevant and timely guidance to the Petitioner and to DOJ, with its Standard Form 50-B, Notification of Personnel Action, with the reverse side, "Notice to Employee" which is found in-part on the following pages.

The Court should note that the United States Department of Justice, with direct knowledge of Petitioner's special disabled veteran's status, employed this relevant OPM-provided document (and variations) to hire and promote, but then subsequently terminate Petitioner's employment without reference to his known preference eligible veteran's status.

NOTIFICATION OF PERSONNEL ACTION
STANDARD FORM 50-B
(REVERSE SIDE)

NOTICE TO EMPLOYEE

KEEP THIS DOCUMENT FOR YOUR RECORDS. IT IS YOUR COPY OF THE OFFICIAL RECORD OF A PERSONNEL ACTION AFFECTING YOUR EMPLOYMENT. PROMPTLY CALL ANY ERROR TO THE ATTENTION OF YOUR SUPERVISOR OR YOUR PERSONNEL OFFICE.

I. Conditions of All Types of Personnel actions

The personnel action identified on the face of this form is subject to all applicable laws, rules and regulations governing Federal employment.

II. Information About Appointments

As a general rule, persons selected from civil service registers to fill continuing jobs in the competive service are given career-conditional appointments. Such appointments are secured through direct competition with other members of the general public seeking similar work in Government agencies, and permit qualified employees to be assigned *without further competitive examination* to other jobs in the competitive service. *Career-conditional appointments become career appointments upon completion of 3 years of substantially continuous creditable service.*

The first year following a nontemporary competitive appointment generally is a probationary period during which an appointee must demonstrate full competance and fitness for Federal employment.

Temporary appointments do not confer a civil service status and do not lead to a career appointment or career-conditional appointment *without some further examination or qualification.*

III. **Information About Tenure Groups**

Those serving under conditional appointments which automatically lead to full tenure after a prescribed time and without further qualification are placed in Group 2.

[Petitioner respectfully asks the Court to note the difference in qualifications and anticipated tenure between employees who are placed in Tenure Group 2 cited above, and those qualifications and tenure prescribed for temporary appointments cited on the previous page, and represented below:]

Temporary appointments do not confer a civil service status and do not lead to a career appointment or career-conditional appointment without some further examination or qualification.

[Please note that the above references are an abridged portion of the OPM guidance furnished on Standard Forms 50-B, Notification of Personnel Action, to every government employee whenever he or she receives any positive or negative notification of personnel action. On the face side of this form, Petitioner has, consistently been referred to as a Schedule A, Tenure Group 2 designated employee who could reasonably expect his Schedule A appointment would "automatically lead to full tenure after a prescribed time and without further qualification," per his Tenure Group 2-designation].

Petitioner has also been consistently referred to in Block 5, Veterans Preference, as a Category 6, Special Compensatory (30 percent or more) disabled veteran. The one notable exception is the Standard Form 50-B, "Notification of Personnel Action", he received on August 14, 1990 terminating his employment effective August 24, 1990 without regard to his known preference eligible veterans status.

Block 18-B refers to the Petitioner's excepted appointment which, as a preference eligible veteran, is a "distinction without significance" for establishing MSPB jurisdiction.

In addition, OPM fulfilled its advisory role to the United States Department of Justice when it approved DOJ's request to extend Petitioner's PMI internship (not realizing the request was made without a legitimate basis to do so), that appears on the following page.

As Ms. Paige, OPM's Chief of the Programs Division, Office of Affirmative Recruiting and Employment, states in relevant part:

"Also the conditions for termination specified under FPM 362, Section 2-8, remain in effect during the one year extension."

The Court is also respectfully asked to note from the perspective of MSPB jurisdiction that DOJ cited two reasons to OPM for its request to extend Petitioner's PMI internship (please see Appendix X) which suggested Petitioner's background investigation was not completed and that his period of service as a program analyst was insufficient to warrant career conversion.

The Court should note further that both these reasons cited would be found to be without merit by the agency's own-appointed Fact- Finder a year later (please see Appendix G, Fact-Finders Report, and supporting document in Appendix Z).

The agency's own-appointed Fact-Finder would also find that the United States Department of Justice had violated Chapter 362 when it requested the extension of Petitioner's internship (and thereby had committed a prohibited personnel practice).

Further, the Fact-Finder found enough evidence and justification to warrant Petitioner's conversion to career status effective August 24, 1989 - a year before his unlawful termination as a "temporary employee"/"expiration of PMI appointment."

U.S. Office of Personnel Management

Washington, D.C. 20415

May 26, 1989

Mr. Warren Oser
Director of Personnel
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Oser:

This is to inform you that your request to extend the Presidential Managment Internship of Mr. Richard Soehngen for a third year, into 1990, is approved.

Mr. Soehngen may be non-competitively converted to the career or career-conditional service at <u>any</u> point during the third year. As noted in FPM Chapter 362, Section 2-4(c), he may not be promoted above the GS-11 grade level during the extended internship period. **Also, the conditions for termination specified under FPM Chapter 362, Section 2-8, remain in effect during the 1 year extension.**

If you have any questions or concerns, please contact Beth Elliott on 632-0601.

Sincerely,
>s
Patricia Paige, Chief
Programs Division
Office of Affirmative
Recruiting and Employment

The Court is respectfully asked to note with special interest that OPM's May 26, 1989 approval letter (cited in Appendix Y and on the previous page) to DOJ authorizing Petitioner's PMI internship extension for a third year, that the OPM approving authority (Ms. Paige) specifically and unmistakably cited Section 2-8 of FPM Chapter 362 as governing the conditions for termination.

Section 2-8 of Chapter 362 of the FPM speaks directly to the rights of preference eligible veterans in Petitioner's Presidential Management Intern Program:

> "The Schedule A appointment of a Presidential Management Intern expires at the end of the 2-year internship period. At that time, the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from OPM (see section 2-6). If neither of those actions is taken, the PMI appointment terminates. Interns are subject to their agencies' policies and procedures regarding budget constraints, staffing patterns and/or reduction in force. For preference eligibles as defined in 5 U.S.C. § 7511 (a)(1)(B), removal actions are subject to the requirements for actions based on unacceptable performance provided at 5 U.S.C.§ 4303(e) or those relating to adverse actions provided at 5 U.S.C. § 7513. **An agency may not remove an intern based upon a prohibited personnel practice listed in 5 U.S.C.**
>
> Termination actions should be consistent with the objectives of the program to select, develop **and retain** for the Federal Service outstanding employees for careers in public sector management. Terminations must be preceded by a full and careful review process. Agency procedures should be developed which provide for periodic review of performance, counseling, notification of adverse action rights for veterans and notification to Presidential Management Intern Program Office of the decision to terminate." (Emphasis Added)

Petitioner respectfully asserts to the Court that irrespective of the fact his appointment expired, his termination was a removal action as defined in 5 U.S.C. § 7512 below:

§ 7512. Actions covered
This subchapter [5 USCS §§ et seq.] applies to —

(1) a removal;
(2) a suspension for more than 14 days;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;

Petitioner respectfully asserts further that (1) this August 14, 1990 removal action, effective August 24, 1990, was subject to OPM's May 26, 1989 approval (cited on page 14 and in Appendix Y) of DOJ's May 23, 1989 request for the extension of Petitioner's PMI internship (Appendix X) which required that Section 2-8 of Chapter 362 would apply to any termination, or removal action, during Petitioner's third year extension and (2) that this removal action was also subject under Section 2- 8 of Chapter 362 to the requirements for adverse removal action for those government employees classified as preference eligible veterans, defined below, which apply directly to Petitioner as a combat- disabled veteran.

Adverse Actions
§ 7511 Definitions; application

(a) For the purpose of this subchapter [5 USCS §§ et seq.]—
(1) "employee" means—
(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

Once again, Petitioner respectfully asserts that, as a preference eligible veteran, the fact he was in the excepted service instead of the competi-

tive service is "a distinction without significance" for purposes of establishing his right to MSPB jurisdiction and a hearing.

It is clear as a result of Ms. Paige's May 26, 1989 OPM approval of Petitioner's third year extension of his PMI internship, that the due process termination procedures governing preference eligible veterans outlined in Section 2-8 would control any removal action.

Therefore, Petitioner reasonably asserts to this Court that he was a known preference eligible veteran (to OPM, DA, and DOJ) as defined in 5 U.S.C. § 7511, and the 10-day termination notice he received for "expiration of PMI appointment" was a removal action as defined in 5 U.S.C. § 7512.

It is also clear that for preference eligible veterans in the Presidential Management Intern Program, removal actions are subject to the requirements for adverse actions based on two very legitimate and valid reasons - neither of which apply in Petitioner's case, and which were not used as a justification for his removal.

The first requirement is specified as an adverse removal action for unacceptable performance which is defined in 5 U.S.C. § 4303(e) and below.

§ 4303. Actions based on unacceptable performance

(e) any employee who is a preference eligible or is in the competitive service who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701 of this title [5 USCS § 7701].

The Court is also requested to note that if a preference eligible veteran is to be subject to an adverse removal action based on unsatisfactory performance, the following additional conditions must be met under 5 U.S.C. § 4303(e):

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice or the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of an agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days.

(c) The decision to retain, reduce in grade, or remove an employee—

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

The Court is requested to note that the sole reason cited in Petitioner's August 14, 1990 removal action, effective August 24, 2990 was "expiration of PMI appointment". To-date Petitioner has never

received any notification of any unacceptable performance that DOJ management would have cited under 5 U.S.C. Section 4303 if it applied in Petitioner's case.

The second applicable section of the U.S. Code that was stated for an adverse action removal of a preference eligible veteran in the PMI Program is specified in Section 2-8 of Chapter 362 as provided for in 5 U.S.C. § 7513 cited below and which allows for removal for cause that will promote the efficiency of the service.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter [5 USCS §§ et seq.] against an employee only for such cause as will promote the efficiency of the service.

(b) an employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action:

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title [5 USCS § 7701].

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter [5 USCS §§ 7511 et seq.], together

with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request. (Added Oct. 13, 1978, P. L. 95-454, Title II, § 204(a), 92 Stat. 1136.)

Again, just as 5 U.S.C. § 4303 specifies, 5 U.S.C. § 7513 also specifies that preference eligible veterans will receive *inter alia:*

> "(1) at least 30 days written notice ... ; (2) a reasonable time, but not less than 7 days, to answer orally and in-writing and to furnish affidavits and other documentary evidence in support of the answers; (3) be represented by an attorney or other representative; (4) a written decision and the specific reasons therefor at the earliest practicable date."

It is undisputed that the United States Department of Justice chose to terminate Petitioner's employment as a preference eligible veteran in the Presidential Management Intern Program with only a 10 days written notice on August 14, 1990, effective August 24, 1990. As the Court may chose to interpret, a notice of removal action that is less than 30 days, is not a 30 days written notice.

It is also undisputed that, to-date, Petitioner has not received notice of the removal action to terminate his employment based on unacceptable performance provided at 5 U.S.C. § 4303(a); or those relating to adverse actions provided at 5 U.S.C. § 7513 as required by law and statute, and by Section 2-8 of Chapter 362 cited by OPM's approval of the extension of Petitioner's PMI internship.

To successfully show that Petitioner, as a preference eligible veteran, should have been removed under adverse action procedures for unsatisfactory performance specified in 5 U.S.C. § 4303 or those related to adverse actions to promote the efficiency of the service provided for in 5 U.S.C. § 7513, the government would have to show Petitioner's performance or conduct reflected on a Performance Work Plan (PWP) and/or Performance Rating, that was in some way deficient.

This the government can not do, despite ample opportunity to do so, and despite Petitioner's determination that a PWP would be established so his performance could be objectively evaluated.

The Court is respectfully requested to note that the purpose of a Performance Work Plan is (1) to determine employee performance and (2) to promote the efficiency of the service, as clearly established in 5 U.S.C. § 4302 cited below

5 U.S.C. § 4302. Performance-rating plans; establishment of:

> "For the purpose of recognizing the merits of employees and their contributions to efficiency and economy in the Federal Service, each agency shall establish and use one or more performance-rating plans for evaluating the work performance of its employees."

As Appendix O, Appendix P, and Appendix S show clearly, despite the opportunity DOJ had to evaluate Petitioner's performance, and despite Petitioner's repeated attempts to initiate a PWP so he could be objectively rated, his immediate supervisor and reviewer, nevertheless, chose not to implement a PWP until ordered to do so on June 6, 1990 - two months before completion of Petitioner's third year.

Further, as the Director of the PMIP's March 1987 notification letter (that Petitioner was accepted as a 1987 Presidential Management Intern Finalist) also makes clear, Petitioner is also eligible for consideration as a special compensatory (30 percent or more), combat-disabled veteran.

The Court may chose to note that 38 U.S.C. § 2011. defines a special compensatory (disabled) veteran referred to in the Director of the PMIP's letter as:

38 U.S.C.S.

§ 2011. Definitions
As used in this chapter [38 USCS §§ et seq.]—

(1) The term "special disabled veteran" means (A) a veteran who is entitled to compensation under laws administered by the Veterans' Administration for a disability rated at 30 percent or more, or (B) a person who was discharged or released from active duty because of a service-connected disability.

Despite a record of consistent attempts (since August 24, 1990, the day of his termination) to assert his special disabled veteran's rights to a full and impartial hearing, the United States Court of Appeals to the Federal Circuit totally ignored Petitioner's earned veteran's preference rights in its September 26, 1991 Decision and Opinion.

This Court may chose to note that this egregious breech of judicial review occurred even though Petitioner had provided a copy of the March 1987 PMI Finalist notification letter from the Director of the PMIP as an appendix in his Informal Brief of Petitioner submitted May 15, 1991 to the U.S. Court of Appeals to the Federal Circuit.

As the March 1987 letter from the Director of the Presidential Management Intern Program states with full authority, Petitioner was known by both OPM and DOJ to be a "special compensatory" veteran. Hence, the U.S. Department of Justice was required to give Petitioner, among other rights, a stated reason for his termination and a right to a hearing to contest his termination.

Additional congressional intent to protect special compensatory (30 percent or more) combat-disabled veterans from arbitrary dismissal are clearly defined in 38 U.S.C. § 2014(a) (Employment within the Federal Government):

"It is the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for qualified disabled veterans of the Vietnam era."

Petitioner respectfully submits that a fair reading of the stated goals and objectives of the Presidential Management Intern Program that was provided earlier in this Petition for the Court's review, coupled

now with the above policy statement, reflects the unmistakable congressional intent to promote the "maximum job advancement opportunities" (cited in 38 U.S.C. § 2014) for special disabled veterans not only in the PMI nomination process, but also in retention/andtermination processes.

Again, to date, Petitioner has not received notice of the removal action to terminate his employment based on unacceptable performance provided at 5 U.S.C. § 4303(a) or those relating to adverse actions provided at 5 U.S.C. § 7513 as required by law and statute, and by the regulation cited by the OPM extension letter.

It is undisputed that Petitioner has a 50 percent permanent disability from the United States Army for "combat-related" injuries/wounds. It is also undisputed that the Veterans Administration has determined Petitioner is 70 percent disabled with no change in medical rating to-date as a result of his military experiences. If Petitioner's special disabled preference eligible veteran status was acknowledged by OPM, DA, and DOJ, - before hire in each case - then it should follow that both lower courts have committed fundamentally harmful reversible error by failing to acknowledge Petitioner's preference eligible status as well.

It is undisputed that the United States Department of Justice was fully appraised of the fact that Petitioner was a special compensatory preference eligible veteran before Petitioner was hired, but chose to ignore his special disabled veteran's status completely on his 10-day termination notice, presented without cause cited, after three (3) years of honorable federal service.

At no time was the Petitioner ever given notification of his adverse actions rights, despite the fact that the United States Department of Justice knew of his preference eligible combat- disabled veteran status; or given periodic review of his performance, except for one mid-cycle rating review (in which Petitioner's supervisor expressed satisfaction with his work) in three (3) years; nor was he ever counseled for poor or unsatisfactory performance, misconduct, inefficiency, or un-

suitability in over one thousand (1000) calendar days of federal employment.

Therefore, to paraphrase the central question before the Court somewhat differently, why - in this absence of poor or unsatisfactory performance, misconduct, inefficiency, or unsuitability - was a special disabled veteran, which veteran also was a Presidential Management Intern, not afforded due process protections to a hearing (day in Court) after being terminated after three (3) years of honorable federal service with only ten (10) days notice, and without cause cited?

To also appreciate Petitioner's "clear interest and commitment to a career" in the federal government, the Court is also respectfully requested to consider the following questions when reviewing the rulings of the lower courts which have consistently held Petitioner is a "temporary employee" without regard for his known preference eligible veteran status. These series of questions would have been presented during a hearing to establish jurisdiction if the MSPB had afforded the Petitioner the opportunity for a hearing.

(1) If Petitioner was to be considered a "temporary employee", why was he a member of the Federal Employees Retirement System(FERS) from the onset of his employment, August 24, 1987 through August 24, 1990, the day of his termination?

(2) If petitioner was to be considered a "temporary employee", why did the United States Department of Justice pay in excess of $20,000 to move his family of six from Texas to Virginia in August 1988?

(3) If Petitioner was to be considered a "temporary employee", why did the United States Department of Justice pay approximately $1,900 a month plus per diem expenses for an apartment for his family from August to November 1988.

(4) If Petitioner was to be considered a "temporary employee", why was he promoted as a PMI/program analyst from GS-9 to GS-11 within one year of his entering government service?

(5) If Petitioner was to be considered a "temporary employee", why did the United States Department of Justice grant Petitioner the right to the grievance process, with a costly transcribed record of proceedings by a certified court reporter that is estimated to have cost the Department in excess of $5,000? (The Fact-Finder's Report was not to consider Petitioner's termination, but was impaneled to hear Petitioner's grievance filed the year before regarding his PMI extension into the third year.)

(6) If Petitioner was to be considered a "temporary employee", why was he provided eight (8) months before his termination with nine (9) training courses (estimated to have cost the government several thousand dollars) to attend to within two (2) days of his completion of three (3) years of honorable federal service to the government? (Please see Appendix Q.)

(7) If Petitioner was to be considered a "temporary employee", why was he given a Performance Work Plan (PWP) on June 20, 1990 covering the period past his August 24, 1990 termination date (with only 10 days notice and without cause cited) through the March 31, 1991 rating cycle for DOJ employees? (Please see Appendix T.)

(8) If Petitioner was to be considered a "temporary employee", why did CIJ Robie offer in his June 10, 1988 letter to Petitioner career promotion potential to GS-13 as a program analyst (based on satisfactory performance) in the Criminal Alien Unit - obviously past Petitioner's August 24, 1989 PMI internship completion date - while Petitioner was stationed in Texas in 1988 in another capacity? (This letter is an exhibit taken under sworn testimony in an evidentiary hearing conducted by a Fact-Finder appointed by the United States Department of Justice.)

(9) If, as the lower courts contend, Petitioner was a "temporary employee", does not logic dictate Petitioner would have been subject to "further examination or qualification" before he could reasonalbly expect career conversion? But as the March 1987 PMI Finalist notification letter (and SF-50B, Notification of Personnel Action, Tenure Group 2 designation) makes clear, Petitioner could reasonably expect "Upon the successful completion of your internship (based on satisfactory performance), you will be eligible for conversion to the career service without further competition."

In fact since the inception of the PMIP in 1978, no Presidential Management Intern has ever been "subject to further examination or qualification", and per their "Tenure Group 2" classification, have had their Schedule A appointments "lead to full tenure after a prescribed time, and without further qualification."

In short, a PMI is normally converted to career status at the completion of his internship, which is indicative of the fact that it is expected an appointment may expire, but tenure will continue. Petitioner sought through the discovery process to show this evidence to the ALJ and the MSPB, but was denied his due process right to gather this evidence.

In summary, at its most narrow interpretation, the central issue before the Court is whether or not the lower courts erred, as a matter of fact and law, in classifying Petitioner's tenure as a third year Presidential Management Intern/special disabled veteran as that of a "temporary employee"; and thereby deny Petitioner had sufficient employment status after three (3) years of honorable federal service to warrant classification, at the very least, as a "preference eligible employee", which would otherwise invoke the appeal rights available under the Civil Service Reform Act.

For a further review of the arguments Petitioner offered to the MSPB regarding his request for MSPB jurisdiction and a hearing, please see Appendix E, Appellant's Submission on the Issue of Jurisdiction, and

Appendix F, Appellant's Supplemental Submission to the Record, with Appendix G, Agency Fact-Finder's Report attached.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This petition presents an issue where the Opinion below conflicts with previous decisions of this Court recognizing due process rights and property interests/employment status belonging to certain civil servants who are combat- disabled, preference eligible veterans; and, the Opinion below completely overlooks and ignores the arguments presented below that certain combat- disabled, preference eligible veterans are entitled to due process rights before they may be terminated, these rights being conferred not only by Congress but by the Executive Branch's Office of Personnel Management, which administers the PMI Program.

This Court has held consistently that no one may be deprived of a property interest by a government agency unless that property right be taken in accordance with due process of law. This Court has held that employment by a government agency may be considered a property right, where the employment involves tenure (the holding of employment for more than one year).

In this case now before the Court on Petition for Writ of Certiorari, the employing agency could not discharge from employment the Petitioner unless the agency acted in accordance with the Office of Personnel Management's regulations governing termination from the PMI Program. This regulation, set forth at Appendix M to this Petition, provides in substantial part:

"The Schedule A appointment of a Presidential Management Intern expires at the end of the 2-year internship period. At that time, the employing agency may, with no break in service, convert the intern to the competitive service or extend the internship with prior approval from OPM (see section 2-6). If neither of those actions is taken, the PMI appointment terminates. Interns are subject to their agencies' policies and procedures regarding budget constraints, staffing patterns

and/or reduction in force. **For preference eligibles as defined in 5 U.S.C. § 7511 (a)(1)(B), removal actions are subject to the requirements for actions based on unacceptable performance provided at 5 U.S.C.§ 4303(e) or those relating to adverse actions provided at 5 U.S.C. § 7513. An agency may not remove an intern based upon a prohibited personnel practice listed in 5 U.S.C."**

"Termination actions should be consistent with the objectives of the program to select, develop **and retain** for the Federal Service outstanding employees for careers in public sector management. Terminations must be preceded by a full and careful review process. Agency procedures should be developed which provide for periodic review of performance, counseling, **notification of adverse action rights for veterans** and notification to Presidential Management Intern Program Office of the decision to terminate."

As OPM's approval letter requires for the extension of Petitioner's internship into the third year, Petitioner reasonably had a protected right to either continued employment or to termination proceedings as set forth in the OPM letter and in Section 2-8, Chapter 362.

Unless this Court determines that the Congressional provisions — as incorporated by reference in the OPM's Presidential Management Intern regulations paragraph 2-8 — mandating the manner in which, and the grounds upon which, special compensatory, preference eligible veterans may be terminated from employment, provide for, in the least, an opportunity to be heard on the merits of whether a preference eligible employee's job termination was in accordance with the clear mandate of the law and the regulation, there will never be an opportunity for any preference eligible veteran within this classification of employees to seek review of his or her termination because the Merit Systems Protection Board does not accept jurisdiction. The reasoning of the Merit System Protection Board is circular: the MSPB will not even hold a hearing to determine whether it had jurisdiction, hence, it is impossible for a special compensatory preference eligible employee in the PMI Program to establish juris-

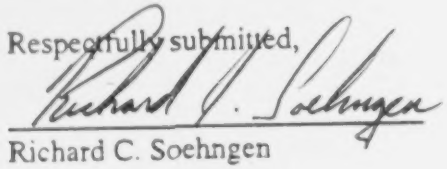
diction, much less to establish that the employing agency's termination actions were completely contrary to Congressional and agency mandate.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit in this matter.

December 26, 1991

Respectfully submitted,



Richard C. Soehngen

PRE-DOCKET COURT CORRESPONDENCE

The following pages contain all the correspondence relating to the filing of this Petition with the Office of the Clerk of the Supreme Court of the United States since December 26, 1991.

(Date stamped, "Received Hand Delivered", with the Court on December 26, 1991.)

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

RICHARD C. SOEHNGEN, Pro Se Petitioner

v.

UNITED STATES OF AMERICA, Respondent

MOTION TO PROCEED UNDER RULE 40 OF THE SUPREME COURT

Veterans, Seamen, and Military Cases

Petitioner, Richard C. Soehngen, a special compensatory (30 percent or more) combat-disabled veteran seeking to establish reemployment rights, respectfully asks the Court to invoke Rule 40 of the Supreme Court so he may file the attached petition for a writ of certiorari without payment of court costs or fees and permit Rule 39 regarding Pro Se printing requirements. In lieu of an affidavit in support of a motion for leave to proceed in forma pauperis, attached is an affidavit setting forth Petitioner's status as a special compensatory veteran.

_____

Pro Se Petitioner

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153
(703) 720-0315

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED UNDER RULE 40 OF THE SUPREME COURT

VETERANS, SEAMEN, AND MILITARY CASES

I, Richard C. Soehngen, being duly sworn, depose and say that I am the petitioner in the above-entitled case and that in support of my Motion to Proceed under Rule 40 of the Supreme Court, do hereby state the following:

During my first tour of duty in the Republic of Vietnam I was wounded-in-action on Friday, June 13, 1969. Some time later I received the award of the Purple Heart for wounds that had required medical evacuation (after the military objectives were finally achieved) and also decorated for my own modest actions stemming from the same three-day engagement.

Subsequently, I was also treated for other combat-related injuries during my second tour of duty in the RVN which has resulted in chronic non-psychiatric health problems that still persist today. In 1984, I was admitted as a patient at Walter Reed Army Medical Center for the first of two operations I would receive in the next year and a half. During this period in 1985, I was medically evaluated by a board of neurosurgeons and recommended for a 70 percent medical retirement as a Captain in the U.S. Army which later became a 50 percent permanent disability when my medical condition stabilized. Due to my medical, combat, and administrative records having been scrutinized by the board of neurosurgeons, an addendum to my retirement military orders specifies my medical retirement was a result of "combat-related" injuries. After I was retired from the U.S. Army in January 1986, the Veterans Administration also medically evaluated me in August 1986 and determined the same (70 percent) percentage of disability with no change in medical rating to-date.

My military retirement benefits are currently shared equally with my wife, Olga C. Soehngen; daughter, Diana Eve Soehngen; son, Victor

Andrew Soehngen; daughter, Julia Catherine Soehngen; and daughter, Natalie Erica Soehngen.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

_____

Richard Craig Soehngen

Submitted and sworn to before me this _____ day of _____, 1991.

My commission expires: _____

(Notarized)

_____

Notary Public

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER
v.
THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Richard C. Soehngen, do swear or declare that on this date, December 26, 1991, pursuant to Supreme Court Rules 29.3 and 29.4 and 40, I have served the attached MOTION FOR LEAVE TO PROCEED UNDER RULE 40 OF THE SUPREME COURT and PETITON FOR A WRIT OF CERTIORI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with certified first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2000

United States Court of Appeals for the Federal Circuit
Attn: Clerk of the Court
The National Courts Building
717 Madison Place, NW
Washington, D.C. 20439
(202) 633-6550

Mary E. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718, P.O. Box 883
Washington, D.C. 20044
(202) 324-3000

_____
Richard C. Soehngen, Affiant

Subscribed and sworn to before me this _____day of_____
My commission expires: _____

(Notarized)

_____
Notary Public

(Date-stamped, "Received Hand Delivered", with the Court January 6, 1992)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. _____

RICHARD C. SOEHNGEN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

MOTION FOR RECONSIDERATION OF CLERK OF THE COURT'S IN FORMA PAUPERIS DEPARTMENT DECISION, DATED JANUARY 2, 1992, REQUIRING AFFIDAVIT OF INDIGENCY UNDER RULE 39 IN LIEU OF PETITIONER'S PREVIOUS MOTION AND AFFIDAVIT TO PROCEED AS A VETERAN UNDER RULE 40 OF THE SUPREME COURT

TO: THE HONORABLE WILLIAM H. REHNQUIST,
CHIEF JUSTICE OF THE SUPREME COURT

This motion is respectfully submitted under Rule 21 (Motions to the Court) and Rule 22 (Applications to Individual Justices) of the Supreme Court requesting the Court to interpret the affidavit requirements for veterans seeking to establish reemployment rights under Rule 40 of the Supreme Court. The essence of this case entails the rights afforded to special compensatory (30 percent or more) preference eligible combat-disabled veterans to equal access to justice under the law, and for this reason, the congressional and judicial intent of Rule 40 would be advanced if the Court were to find Petitioner is not obligated to pay court fees. Since this application requests a review of the intent and affidavit requirements of the Court's rules, this motion is respectfully submitted to the Chief Justice in lieu of to a Circuit Justice.

On December 26, 1991 Petitioner submitted a timely motion, with a notarized supporting affidavit, to proceed under Rule 40 of the Supreme Court with a writ of certiorari to the Court. On January 3, 1992 Petitioner received the attached letter dated January 2, 1992 from the Clerk of the Court's In Forma Pauperis Department requesting an affidavit of indigency under Rule 39. Also enclosed was the motion, notarized affidavit, notarized proof of service, writ of certiorari, and appendices filed December 26, 1991.

Please note the middle paragraph in the In Forma Pauperis Department's unsigned letter:

"No notarized affidavit or declaration of indigency is attached. See Rule 39. Youmay use the enclosed form."

Petitioner respectfully asserts these statements are incorrect for the following reasons:

* The notarized affidavit outlining Petitioner's veterans status required under Rule 40 (that was attached to his motion and returned by the In Forma Pauperis Department), is now resubmitted to the attention of the Chief Justice.

(Another motion, with attached notarized affidavit properly filed on December 26, 1991, remains on file with the writ of certiorari in the main section of the Clerk of the Court's office.)

* Rule 40 does not state Rule 39 applies.

* No enclosed form was included in the packet returned from the Court's In Forma Pauperis Department.

* In addition, I am unaware of any provision specified in the published Rules of the Court for the United States Court of Appeals for the Federal Circuit which would have afforded me the opportunity to proceed as a veteran at the lower court level, without payment of court costs and fees.

* Petitioner recognizes that he is not entitled to declare indigency before the Court despite the hardships associated with his extended unemployment. However, Petitioner reasonably asserts that his honorable motion to proceed as a veteran with a notarized affidavit setting forth his status as a veteran is a credible request to the Court to meet the intent and affidavit requirements of Rule 40.1 for the purpose of gaining equal access to justice under the law.

Accordingly, Petitioner requests the Court to interpret the intent, and affidavit requirements, of Rule 40.1 which states:

.1. A veteran suing to establish reemployment rights under 38 U.S.C. Section 2022, or under any other provision of law exempting a veteran from the payment of fees or court costs, may file a motion to proceed upon typewritten papers under Rule 34, except that the motion shall ask leave to proceed as a veteran, and the affidavit shall set forth the moving party's status as a veteran.

Petitioner reasonably asserts that his notarized affidavit in support of his motion to proceed as a veteran under Rule 40, which sets forth Petitioner's claim as a special compensatory, preference eligible combat-disabled veteran, meets the intent of Rule 40.1 without the necessity of filing a declaration of indigency. An attached errata change to this motion clarifies the intent of Petitioner's original motion to the Court requesting permission to proceed upon typewritten papers under Rule 34 (instead of Rule 39 inadvertently misstated in the original motion). Please note Petitioner is requesting to proceed as a veteran seeking to establish his reemployment rights under Rule 40 and not as an in forma pauperis seeking to overturn a criminal conviction under Rule 39. Both rules exempt the payment of fees and court costs, but Petitioner is requesting to proceed as a veteran, and not as an indignant, with an affidavit setting forth his status as a veteran as required by Rule 40.

Therefore, Petitioner respectfully requests the Court to interpret the intent, and affidavit requirements, of Rule 40.1, and advise the Clerk

of the Court's In Forma Pauperis Department and the Petitioner if Petitioner's Affidavit in Support of a Motion to Proceed Under Rule 40 meets the spirit and intent of Rule 40.1 of the Supreme Court.

In the event that the Court determines that Rule 40.1 does not exempt Petitioner from court costs and fees, and an affidavit of indigency or a payment of court costs is required, Petitioner requests that the Court so advise, and provide Petitioner with a reasonable time to pay the courts costs and fees.

The following documents are resubmitted and returned to the Court's possession for a designated docket number, while the Court awaits the United States Department of Justice's Brief in Opposition.

1. MOTION TO PROCEED UNDER RULE 40 OF THE SUPREME COURT 2. AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED UNDER RULE 40 OF THE SUPREME COURT 3. PROOF OF SERVICE 4. PETITION FOR WRIT OF CERTIORARI 5. APPENDICES

Per Rule 22.2, attached is the original and two copies of this application and Proof of Service indicating this motion, and attached errata change, was served by certified first class prepaid mail to all parties this date.

Dated January 6, 1992

_____

Richard C. Soehngen, Petitioner

Subscribed and sworn to before me this _____day of _____ My commission expires: _____

(Notarized)

_____

Notary Public

(Attachment to January 6, 1992 Motion for Reconsideration)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter,
Clerk of the Court

January 2, 1992

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153

RE: Richard C. Soehngen v. United States

Dear Mr. Soehngen:

The above-entitled petion for a writ of certiorari was hand- delivered December 26, 1991. The papers are returnedfor the following reasons:

No notarized affidavit or declaration of indigency is attached. See Rule 39. You may use the enclosed form.

Inasmuch as this case did not proceed in the lower court under 39 U.S.C. §2022, and affidavit of indigency is necessary. Resubmit only the original documents - no copies are necessary.

Very truly yours,
In Forma Pauperis Department
(202) 479-3025

Enclosures

(Attachment to January 6, 1992 Motion for Reconsideration)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ERRATA CHANGE

Petitioner hereby corrects the previously filed motion dated December26, 1991 entitled MOTION TO PROCEED UNDER RULE 40 OF THE SUPREMECOURT. Reference to my request to the Court to waive court costs orfees under Rule 40, should now be deleted, leaving only a request toproceed as a veteran upon typewritten papers under Rule 34.

_____

Richard C. Soehngen, Petitioner

(Atachment to January 6, 1992 Motion for Reconsideration)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Richard C. Soehngen, do swear or declare that on this date, January 6, 1992, pursuant to Supreme Court Rules 29.3 and 29.4 and 40, I have served the attached MOTION FOR RECONSIDERATION OF CLERK OF THE COURT'S IN FORMA PAUPERIS DEPARTMENT DECISION, DATED JANUARY 2, 1992, REQUIRING AFFIDAVIT OF INDIGENCY UNDER RULE 39 IN LIEU OF PETITIONER'S PREVIOUS MOTION AND AFFIDAVIT TO PROCEED AS A VETERAN UNDER RULE 40 OF THE SUPREME COURT on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with certified first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2000

United States Court of Appeals for the Federal Circuit
Attn: Clerk of the Court
The National Courts Building
717 Madison Place, NW
Washington, D.C. 20439
(202) 633-6550

Mary E. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718, P.O. Box 883
Washington, D.C. 20044
(202) 324-3000

_____
Richard C. Soehngen, Affiant

Subscribed and sworn to before me this ___day of_____
My commission expires: _____

(Notarized)

_____
Notary Public

January 13, 1992

Supreme Court of the United States
William K. Suter, Clerk of the Court
MG, USA JAGC (Ret.)
Office of the Clerk
Washington, D.C. 20543

Sir:

By way of a brief introduction, my name is Richard C. Soehngen. On December 26, 1991 I filed a timely motion with the Court requesting permission to proceed as a veteran under Rule 40 of the Supreme Court with a notarized affidavit setting forth my status as a special compensatory (30 percent or more) preference eligible combat- disabled veteran as required by Rule 40.1. The properly filed petition for writ of certiorari respectfully asks the Court to consider one (1) constitutional issue involving the due process protections that may be afforded to me as a preference eligible veteran to MSPB jurisdiction and a hearing. Also properly filed on December 26, 1991 was the proof of service as required.

On January 3, 1992 I received a letter from the In Pauperis Department (with my petition for writ of certiorari returned) requesting that I provide a declaration of indigency under Rule 39. Since I believe my December 26, 1991 affidavit in support of my motion to proceed as a veteran under Rule 40 has properly set forth my status as a veteran, I filed the attached motion (and application) for reconsideration with the Court on January 6, 1992 respectfully requesting the Court to interpret the affidavit requirements for veterans seeking to proceed under Rule 40 of the Supreme Court.

On January 11, 1992 I received another letter from the In Pauperis Department stating my papers were returned "for failure to reflect the changes requested in prior correspondence." However, the January 6, 1992 Motion for Reconsideration of the Clerk of the Court's In Forma Pauperis Decision dated January 2, 1992 Requiring Affidavit of

Indigency in lieu of Petitioner's Previous Motion to Proceed as a Veteran under Rule 40 of the Supreme Court had not been specifically denied by a Justice. Rule 22.5, Applications to Individual Justices, indicates that a Justice denying the application "will note the denial thereon".

In any case, I would like to respectfully emphasize that I wish to cooperate fully with your office with this follow-up request to proceed as a veteran and not as an in forma pauperis indigent. Please note that, although I am not an attorney, I have carefully reviewed Rule 39, and specifically Section 1746 (Unsworn declarations under penalty of perjury) and Section 1915 (Proceeding in forma pauperis) of 28 U.S.C.; and Section 3006A(d), (Attorney fees) of 18 U.S.C Therefore, I recognize, as I stated in my motion for reconsideration, that I am not entitled to declare indigency, or poverty, before the Court, despite the hardships associated with my extended unemployment.

However, I still believe my request to proceed as a veteran seeking to establish reemployment rights, with a notarized affidavit setting forth my status as a veteran, is a credible request to the Court in order to meet the intent and affidavit requirements of Rule 40.1.

To help cooperate fully with your office, I respectfully propose to withdraw my motion for reconsideration, pay the Court's filing fees, and submit an errata change to my original motion to proceed as a veteran under Rule 40 of the Supreme Court. Without waiving my original motion to proceed as a veteran, the attached example of my proposed errata change would strike my original request to the Court to waive court costs, and thereby ask the Court only to allow me to proceed as a veteran upon typewritten papers under Rule 34.

In closing, I hope this proposal meets with your approval and the Court's approval. While I simply cannot in good faith submit a declaration of indigency to the Court, I wish to cooperate as fully as possible with your office.

Please advise if this proposal is satisfactory so I may forward the proposed errata change to all parties concerned and pay the Court's filing fees. Enclosed are the documents returned to the Court's possession. Thank you for your consideration.

Respectfully,

Richard C. Soehngen, Petitioner
CPT, AUSR AR (Ret.)
Suite #100
8094 Rolling Road
Springfield, VA 22153

(Attachment to January 13, 1992 Correspondence)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter,
Clerk of the Court

January 2, 1992

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153

RE: Richard C. Soehngen v. United States

Dear Mr. Soehngen:

The above-entitled petition for a writ of certiorari was received January 6, 1992. The papers are returned for the following reasons:

You (sic) papers are returned for failure to reflect the changes requested in prior correspondence.

Very truly yours,
In Forma Pauperis Department
(202) 479-3025

Enclosures

(Attachment to January 13, 1992 letter to Clerk of the Court)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ERRATA CHANGE

Petitioner hereby corrects the previously filed motion dated December 26, 1991 entitled MOTION TO PROCEED UNDER RULE 40 OF THE SUPREME COURT. Reference to my request to the Court to waive court costs or fees under Rule 40, should now be deleted, leaving only a request to proceed as a veteran upon typewritten papers under Rule 34.

_____
Richard C. Soehngen, Petitioner

(Attachment to January 13, 1992 correspondence)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER
v.
THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Richard C. Soehngen, do swear or declare that on this date, January 6, 1992, pursuant to Supreme Court Rules 29.3 and 29.4 and 40, I have served the attached ERRATA CHANGE, DATED JANUARY 13, 1992, on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with certified first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2000

United States Court of Appeals for the Federal Circuit
Attn: Clerk of the Court
The National Courts Building
717 Madison Place, NW
Washington, D.C. 20439
(202) 633-6550

Mary E. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718, P.O. Box 883
Washington, D.C. 20044
(202) 324-3000

_____
Richard C. Soehngen, Affiant

Subscribed and sworn to before me this ___day of_____
My commission expires: _____

(Notarized)

_____
Notary Public

(Date-stamped, "Received Hand Delivered", with the Court on January 22, 1992.)

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

RICHARD C. SOEHNGEN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

MOTION TO WITHDRAW REQUEST TO PROCEED UNDER RULE 40 AND REQUEST FOR EXTENSION OF TIME

Petitioner, Richard C. Soehngen, hereby withdraws his request to proceed under Rule 40 and requests an extension of time of ten days in which to have his petition and appendices printed in the proper format. Initially, petitioner requested leave to file his petition and appendices in typewritten format pursuant to Rule 40. The Court has treated this motion as a request to proceed in forma pauperis. Since the petitioner does not wish to proceed in forma pauperis and is prepared to pay the filing fee and comply with the court's requirements as to printing, petitioner now moves to withdraw his request to proceed under Rule 40 and to allow him an additional ten days to have his papers printed in the format required by the rules of the Court.

Richard C. Soehngen
Suite #100 8094 Rolling Road
Springfield, VA 22153
703-720-0315

Pro Se Petitioner

(Attachment to Motion to Withdraw Request to Proceed Under Rule 40)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER
v.
THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Richard C. Soehngen, do swear or declare that on this date, January 22, 1992, pursuant to Supreme Court Rules 29.3 and 29.4 and 40, I have served the attached MOTION TO WITHDRAW REQUEST TO PROCEED UNDER RULE 40 AND REQUEST FOR EXTENSION OF TIME, DATED JANUARY 22, 1992, on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with certified first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2000

Mary E. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718, P.O. Box 883
Washington, D.C. 20044
(202) 324-3000

_____
Richard C. Soehngen, Affiant

Subscribed and sworn to before me this ____day of_____
My commission expires: _____

(Notarized)

_____
Notary Public

(Received by Petitioner on January 24, 1992.)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK

William K. Suter
Clerk of the Court

January 17, 1992

Richard C. Soehngen
Suite #100
8094 Rolling Road
Springfield, VA 22153

RE: Richard C. Soehngen v. Merit Systems Protection Board

Dear Mr. Soehngen:

In response to your letter of January 13, 1992, Rule 40.1 of the Rules of this Court expressly pertains to a "veteran suing to establish reemployment rights under 38 U.S.C. 2022, or under any other provision of law exempting a veteran from payment of fees or court costs." As your motion for leave to proceed as a veteran cites no statute which would bring you within the provisions of Rule 40.1, your petition may not be accepted for filing pursuant to that Rule.

If you do not qualify to proceed in forma pauperis, your petition may be filed only if you promptly submit forty copies of the petition prepared in compliance with Rule 33 and the $300 docketing fee required by Rule 38.

The papers that accompanied your letter are herewith returned.

Very truly yours,
WILLIAM K. SUTER
By
(s)Christopher W. Vasil
Deputy Clerk

January 31, 1992

Supreme Court of the United States
William K. Suter, Clerk of the Court
MG, USA JAGC (Ret.)
Office of the Clerk
Washington, D.C. 20543

Attention: Christopher W. Vasil, Deputy Clerk

Sir:

On January 24, 1992 I received your letter dated January 17, 1992, and understood that the delay in delivery was probably due to the Court's holiday schedule earlier in the week.

Thank you for the guidance and instructions for docketing my case that were contained in your letter. As you will note, I intend to file my case on February 3, 1992 with the 40 printed copies the Court now requires (and pay the Court fees) as soon as the printing is accomplished.

In closing, I appreciate your guidance in this matter and intend to comply as soon as possible. Thank you for your consideration.

Respectfully,

Richard C. Soehngen, Petitioner
Suite 100
8094 Rolling Road
Springfield, VA 22153

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NO._____

RICHARD C. SOEHNGEN, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, Richard C. Soehngen, do swear or declare that on this date, February 3, 1992, pursuant to Supreme Court Rules 29.3 and 29.4 and 33, I have served three (3) copies of each five (5) volume edition of the PETITION FOR WRIT OF CERTIORARI WITH APPENDICES, on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with certified first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2000

Mary E. Magee
U.S. Department of Justice
Federal Programs Branch
Room 3718, P.O. Box 883
Washington, D.C. 20044
(202) 324-3000

_____
Richard C. Soehngen, Affiant

Subscribed and sworn to before me this _____day of_____
My commission expires: _____

(Notarized)

_____
Notary Public